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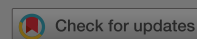
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# Are EU dawn raid procedures on a collision course with the ECHR? Does a cautionary tale from Canada offer guidance? \*

Gavin Murphy

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## Are EU dawn raid procedures on a collision course with the ECHR? Does a cautionary tale from Canada offer guidance?\*

Gavin Murphy

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### Introduction

There is a striking contrast between Canada and the European Union (EU) with respect to the authorities' ability to search computers and mobile phones – and this contrast invites exploration, comparison, review and comment. Specific and prior authorisation to search computers and mobile phones<sup>1</sup> is required in Canadian law except for searches incident to arrest in narrowly defined instances.<sup>2</sup> This position differs dramatically with sweeping inspections of data in EU competition law investigations where no specific authorisation is needed to search electronic devices in the course of a dawn raid.<sup>3</sup>

This paper compares the law in Canada regarding searches of electronic data where the Supreme Court of Canada (SCC) ruled in 2013 that specific and prior authorisation is required to search a computer (including mobile phones). The law was refined by the SCC in 2014 to allow for warrantless searches of mobile phones incident to arrest provided specific safeguards are adopted. The law in Canada is polar opposite to EU law<sup>4</sup> where no expectation of computer privacy and no specific authorisation are afforded for inspections of electronic devices

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\*The views expressed in this article are strictly those of the author and no way necessarily reflect the policies or opinions of anyone else. He thanks his friends and colleagues Shane Zurbrigg and Sally Arsove for their helpful comments on an earlier draft. This article was completed in November 2016.



Notes

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Referred to in Canada as cellular phones or cell phones.

<sup>2</sup> Or warrantless searches in exigent circumstances, for example, to prevent an imminent threat to safety.

<sup>3</sup> A dawn raid is an unannounced inspection of premises carried out by the European Commission in accordance with Article 105 of the Treaty on the Functioning of the European Union (TFEU). Officials will normally be aided by representatives from the national competition authority.

<sup>4</sup> This is not the only instance where Canadian and EU law differ. In Canada, in-house counsel and their client benefit from solicitor-client privilege (referred to as legal professional privilege in the EU), whereas in-house legal advisers and their client do not benefit from similar protections in the EU. See in this regard, Gavin Murphy, 'Is It Time to Rebrand Legal Professional Privilege In EC Competition Law? An Updated Look' (2009) 35 CLB 443.

<sup>5</sup> The Commission is the executive branch of the EU and one of its responsibilities is developing rules and regulations regarding competition policy and enforcing those provisions.

<sup>6</sup> Formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>7</sup> Query: ... 2/13 of 18  
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<sup>8</sup> R v Vu, ... /scc-  
[csc/en/it](https://www.scc-csc.ca/en/it)

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<sup>12</sup> Justice Cromwell noted at para 38 of the judgment that mobile phones are similar in function and storage capacity to computers and that the term ‘computer’ in the judgment should be understood to cover these devices. See also s 31.8 of the Canada Evidence Act RSC 1985 c C-5 for a definition of ‘computer system’.

<sup>14</sup> Vu at paras 40, 45 and 47.

<sup>16</sup> Query: Could seizing an entire computer hard drive for an extended period of time disproportionately prejudice a person? Could police potentially abuse their power? But to

[illegible]

<sup>19</sup> A voir [separately](#)  
to deter

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These valid law enforcement objectives include protecting the police, the accused and the public, preserving evidence and discovering evidence such as locating additional suspects, where the investigation could be stymied or significantly hampered without the power to search the mobile incident to arrest.

<sup>22</sup> These three approaches are a categorical prohibition, a reasonable and probable grounds requirement and limiting searches to exigent circumstances.

<sup>23</sup> See n 21 above.

<sup>24</sup> Query: Vu involves the search of computers at a private residence. Can it be distinguished from computer searches of business premises? The overwhelming majority of searches in Canadian competition law take place at business premises.

<sup>25</sup> Unlike specific reference to tablets and the cloud in the EU. See below.

<sup>26</sup> The situation is even more restricted in the USA. In *Riley v California* 134 S Ct 2473 (2014), the US Supreme Court unanimously held that a warrantless search and seizure of electronic data on a mobile phone incident to arrest was unconstitutional. This case was referred to in the Fearon decision.

<sup>27</sup> The key criminal law offences being conspiracy and bid-rigging. Obstructing a validly authorised search could also result in criminal charges. See s 64 of the Act.

<sup>28</sup> Fearon

<sup>29</sup> A just Act.

<sup>30</sup> 'The E specialized

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<sup>33</sup> ‘Business executives should therefore be prepared that they may have to hand over to the inspectors their blackberry and /or smartphone during an inspection. They may be requested for passwords for these items and a forensic copy of the data on these devices may be made. They should be prepared to manage their work schedule without these devices for several hours, and at worst until the end of the raid (which may last as long as three days).’ Peter Citron (ed), ‘European Commission dawn raids – IT searches,’ Kluwer Competition Blog, 25 March 2013

[illegible]

from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.'

<sup>36</sup> European Commission, 'Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003', 11 September 2015

<[http://ec.europa.eu/competition/antitrust/legislation/explanatory\\_note.pdf](http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf)> accessed 22 October 2016.

<sup>37</sup> 2015 Commission explanatory note at paras 9–11.

<sup>38</sup> Notwithstanding the principle of proportionality in EU law.

<sup>39</sup> It is nonsense to think that business data would not be comingled with personal information on private devices in all instances. On the other hand, the Commission implies that inspections would be practically meaningless if private devices were not subject to examination.

<sup>40</sup> Undertakings and legal advisers should develop a reasonable and workable process to identify privileged materials to shield them from inspection while at the same time allowing

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<sup>42</sup> Robot n Rights

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<sup>44</sup> The Maastricht Treaty in Title 1 Common Provisions Article F 2 says: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’ Official Journal of the European Communities, 92/C 191, pp 1-112, 29 July 1992 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN>> accessed 24 October 2016.

<sup>46</sup> If not already with the Charter of Fundamental Rights of the European Union and in particular the personal freedoms (Respect for private and family life) found in Article 7.



See Niemietz v Germany [1992] ECHR 80

<<http://www.worldlii.org/eu/cases/ECHR/1992/80.html>> accessed 22 October 2016.

<sup>48</sup> Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, 18 December 2014 <<http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>> accessed 25 October 2016.

<sup>49</sup> A O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty,' 18 December 2014 <<https://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>> accessed 22 October 2016.

<sup>50</sup> A considerable body of jurisprudence has already developed in Canada with provincial and appeal courts applying the principles laid down in Vu and Fearon. For further details on these cases see the Canadian Legal Information Institute (Can LII) <<http://www.canlii.org/en/index.php>> accessed 25 October 2016.

<sup>51</sup> Not to mention Riley v California. See above.



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